Ancillary relief in Northern Ireland: the jurisprudence of "the noughties"

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Recent Northern Ireland jurisprudence has addressed many contentious issues which Parise from the exercise of judicial discretion in ancillary relief proceedings. This is of particular significance since the seminal decision of *White* v *White*, which has redrawn the map of ancillary relief and revitalised the approach of the courts on divorce. A decade has passed since *White* was decided by the House of Lords, and so the time has come to review the decisions that have followed it, and to examine what the response of the Northern Ireland courts has been to this "big money" case.

The caselaw in Northern Ireland has untangled many of the issues left unresolved by the *White* decision in Northern Ireland courts. Examples of such issues are what constitutes conduct that it would be inequitable to disregard; when a clean break is appropriate; and how the yardstick of equality³ should be applied in the wake of *White* v *White*. Other recent jurisprudence has considered more specific matters such as the appropriate approach in situations where a child of the family is disabled or when there has been a conflict of evidence between the parties. This paper pinpoints the most significant developments in caselaw from 2001⁴ until the present date. It considers many issues stemming from the application of Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978.⁵ In short, it aims to provide a reference point for practitioners navigating more difficult ancillary relief cases "where there is no perfect financial solution to the problems caused by the marriage breakdown".⁶

As the majority of ancillary relief judgments in Northern Ireland are written by Masters, the role of the Master in ancillary relief clearly should not be underestimated. Unlike in England and Wales, the Master does not principally deal with procedural matters. Although in many respects a Master has a similar role to a District Judge in the Principal Registry of

^{1 [2000]} UKHL 54.

² Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, at p. 28.

³ This requires equitable distribution of property on divorce, as spouses are treated as equal partners within the relationship pursuant to Lord Nicholls' promotion of the non-discrimination principle.

⁴ This is because the computerised publication of judgments began in 2001. All judgments mentioned in this paper may be found on www.bailii.org/nie/cases/NIHC/Master/.

⁵ In this paper, comparisons will be drawn between caselaw in Northern Ireland and England. As such, it is important to note that the equivalent legislation to the Matrimonial Causes (Northern Ireland) Order in England and Wales is the Matrimonial Causes Act 1973.

⁶ ED v JD (2007) Master 48 per Master Bell.

the Family Division, a Master is not limited by jurisdiction. For example, it is not uncommon for a Master to hear cases that in England or Wales would be heard by a High Court Judge. Not only this, but cases are often referred to a Master due to various complexities and contested issues. As a result, the cases mentioned in this paper are not limited to application in matters heard by Masters. They are of wider significance to the law of ancillary relief in England, Wales and Northern Ireland.

When examining the recent caselaw, it is necessary to consider the legislative framework within which the courts are developing the principles to be applied. The basis of this framework is Article 27 of the Matrimonial Causes (Northern Ireland) Order, which specifies what the court must take into account when an application for ancillary relief has been made. As such, the court has a duty to give first consideration to the welfare of any child of the family, have regard to all circumstances of the case, and should consider the possibility of ending the parties' financial obligations to each other (facilitating a "clean break").

When taking all matters into consideration, the court is asked to focus on factors listed in Article 27(2), which are as follows;

- a) the income, earning capacity, property and other financial resources that each of the parties to the marriage has or is likely to have in the foreseeable future;
- b) the financial needs, obligations and responsibilities that each of the parties to the marriage has or is likely to have in the foreseeable future;
- c) the standard of living enjoyed by the family before the breakdown of the marriage;
- d) the age of each party to the marriage and the duration of the marriage;
- e) any physical or mental disability of either of the parties to the marriage;
- f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension), which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The application of these principles is developed by the law of ancillary relief. In particular, *White* v *White* establishes the current approved interpretation of what Article 27 means for divorcing couples. Prior to these cases, much weight was placed on the financial needs of the parties. However, in *White* it was decided that the law should no longer place a cap on the claimant's award as soon as their needs and reasonable requirements had been met. As a result, previous precedent, which gave homemaking spouses relatively small awards even in high-income cases, was made obsolete. Instead, judges should now regard the value of homemaking and breadwinning contributions during the marriage as equal and measure these contributions against a "yardstick of equality", which cannot be departed from unless

⁷ It is important to note that whilst English authorities mentioned in this paper (such as White v White) are not strictly binding in Northern Ireland, they are applied in Northern Ireland courts because the Matrimonial Causes Act 1973 and Matrimonial Causes (Northern Ireland) Order 1978 are almost identical.

⁸ For example, in Dart v Dart [1997] 1 FCR 21, the wife needed to show that she had made more than a special contribution in order to receive more than her "reasonable requirements".

⁹ See O'D v O'D [1975] 2 All ER 993, Page v Page [1981] 2 FLR 198 and Preston v Preston [1982] 1 All ER 41.

"there is good reason for doing so". ¹⁰ It is submitted that these developments represent a new perspective whereby the ethos of one's claim on divorce is now based on entitlement rather than dependency and need. As Miles explains, the spouse who undertook parenting and homemaking roles during the marriage is no longer regarded as "needy", they are instead perceived to require reimbursement for their investment in the relationship. ¹¹

The caselaw in this paper is also underpinned by Miller, McFarlane, 12 which was eagerly anticipated in post-White terrain. This judgment built upon the White principles of nondiscrimination and equality, and teased out three strands of fairness; needs, 13 compensation and sharing. Whilst need has traditionally been influential to property distribution on divorce, Baroness Hale explained that in certain situations spouses should also receive compensation for any disadvantage that had been generated by the marriage (in the McFarlane case this was the wife's loss of career). The prospect of sharing was also brought to the fore by Lord Nicholls, who asserted that marriage should be perceived to be a partnership of equals. Prior to White, the emphasis on need, even in higher income cases, displayed an emphasis on individual property rights rather than the joint acquisition and enjoyment of property by both spouses. ¹⁴ Alternatively, the sharing principle propounded by Miller, McFarlane ensures equitable (but not equal) property redistribution on divorce that reflects the reality of the marriage partnership. 15 Nevertheless, the relationship between the principles of need, compensation and sharing remains unclear. As such, one must look to recent caselaw in order to extrapolate the practical realities for family lawyers from this new concept of fairness.

1 Non-matrimonial assets

The exposition of the sharing principle in *Miller*, *McFarlane* means that each party is "entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary". However, it is widely accepted that not all property owned by parties in ancillary relief proceedings is treated the same way. Indeed, Wilson has said that "the treatment of inherited assets in the context of ancillary relief claims was thrown into sharp relief by the decision" of *White* v *White*. In this case, Lord Nicholls noted that there is a distinction between different kinds of property, which is in "recognition of the view . . . [that] the property owned by one spouse before the marriage, and inherited property when acquired, stand on a different footing from what may loosely be called matrimonial property". Northern Ireland caselaw has cultivated this distinction between nonmatrimonial and matrimonial property; a divide that can sometimes be difficult to ascertain. The complexity of articulating this distinction is further exemplified by the ambiguous definition of non-matrimonial property in *Miller*, *McFarlane* as representing "a contribution

¹⁰ White v White [2000] UKHL 54, at p. 9e.

¹¹ J Miles, "Equality on divorce?" (2001) Cambridge Law Journal 46

¹² Miller v Miller, McFarlane v McFarlane [2006] UKHL 24.

¹³ At p. 38 of the Miller, McFarlane judgment, ibid., Baroness Hale emphasised the continued relevance of need: "in the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage".

¹⁴ Dart v Dart [1997] 1 FCR 21.

¹⁵ This is the case particularly in longer marriages where property sharing is more apparent.

¹⁶ Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, at p. 16.

¹⁷ J Wilson, "Inherited wealth and ancillary relief claims", 2 June 2005, at www.familylawweek.co.uk/site.aspx?i=ed426.

¹⁸ White v White [2000] UKHL 54, at p. 1578.

to the marriage by one of the parties".¹⁹ Therefore, it is useful to examine the recent judgments regarding inherited property, business assets, pre-marital property and assets that have accumulated after the parties have separated in order to establish what constitutes non-matrimonial property.

INHERITED PROPERTY

Inheritance is important to the law of ancillary relief, and is an issue that is constantly evolving. As inherited property comes from a source "wholly external to the marriage", 20 there has been some dispute as to whether it should be excluded from the matrimonial pot of assets or if it should be merely taken into consideration as one of the Article 27 factors. C and C^{21} indicates that judicial opinion favours the latter. In this case, inheritance submissions were made by the petitioner and respondent with respect to two specific properties. The respondent purchased the first property with his father prior to the marriage, and subsequently inherited his father's share. Similarly, the petitioner acquired a one-third share of the second property upon her father's death. Therefore, it was considered by Master Bell how these shares should be divided on divorce and whether they should be included in the Article 27 exercise. English jurisprudence, such as Norris v Norris,²² was influential to his decision, as it enunciates that it would be "artifice and contrary to the express words of . . . the Matrimonial Causes Act . . . to exclude . . . non marital assets from the pool of assets to be divided". 23 Thus, Master Bell decided that the inherited property in this case was "one of the factors to be taken into consideration in applying the Article 27 checklist".²⁴

The judgment of *G* and *G* and *J*²⁵ is also relevant simply because Gillen J did not attribute any particular importance to the matter of inherited property. In this case, a substantial amount of the parties' large estate was acquired through inheritance, yet this was not considered to be a significant factor during the court's discretionary exercise. As such, one can assume from this decision that the weight of the inheritance issue may be lessened in cases where the marriage has been lengthy.

To date, $A v A^{26}$ is the Northern Ireland courts' most comprehensive statement of the principles in *White* v *White*. Therefore, it is important to note that this case is not merely the most recent decision with regards to inherited property; it is regarded as being the most patent illustration of the changes made by *White* within the context of Northern Ireland.²⁷ The case is important within this section because it demonstrates that inherited property can be important to the exercise of judicial discretion when it represents a large portion of what the couple owns. The majority of the assets in A v A were inherited by the husband from his father. This was effectively part of Master Redpath's rationale for ordering a transfer of 37 per cent of the matrimonial assets to the husband by way of a lump sum. With reference to the "reverse check" recommended in M v M (*Financial Provision: Evaluation*

¹⁹ Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, at p. 25.

²⁰ Ibid.

^{21 (2007)} Master 44.

^{22 [2003] 1} FLR.

²³ Ibid. p. 125.

²⁴ C and C (2007) Master 44, at p. 18.

^{25 [2003]} NIFam 19.

^{26 (2009)} Master 72.

²⁷ Practitioners may find it useful to read the judgment of A v A (2009) Master 72, as it enunciates the general principles of ancillary relief (as listed in P Duckworth, *Matrimonial Property and Finance* (London: Family Law 2000)).

of Assets),²⁸ the Master emphasised that the corollary of this is that the husband will retain an award 50 per cent greater than that of the wife.²⁹ Therefore, this judgment is evidence that, as one of the circumstances of the case, inherited property may justify a departure from equality in a medium-term marriage. However, it is important to note Master Redpath's assertion that, when inherited wealth represents a contribution towards marital property (as in the present case), it should "not in any sense [be] ring fenced in the ancillary relief exercise".³⁰ In other words, although the inheritance factor may justify a departure from equality in some cases, this departure essentially does not encourage the absolute retention of inherited property by one spouse.

Indeed, Northern Ireland caselaw consistently weighs the inheritance factor against the impact it will potentially have on the overall fairness of the case. This is a welcome guide in comparison with English caselaw, as commentators have noted³¹ conflicting approaches by different judges regarding this issue. On one hand, Bennett J³² held that inherited assets should not be quarantined, and should be considered as a contribution to the welfare of the marriage by the beneficiary. On the other hand, Mr Peter Hughes QC argued³³ that inheritance should be excluded from the matrimonial pool because a fair balance can still be struck without accounting for these assets.

Amid this confusion, family lawyers will be relieved to know that, in Northern Ireland, the caselaw appears to concur with Bennett J in *Norris*, and so inherited assets will generally be taken into account on divorce. A helpful summary explaining the accepted approach of the courts towards inheritance can be found in *P v P (Inherited Property)*:³⁴

The judge should . . . [according to White v White] decide how important [inheritance] is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered . . . Fairness might require quite a different approach if the inheritance was a pecuniary legacy that accrued during the marriage than if the inheritance were a landed estate that had been within one spouse's family for generations and had been brought into the marriage with an expectation that it would be retained in specie for future generations. ³⁵

The most recent and comprehensive judgment in England and Wales on how the principles in *Miller*, *McFarlane* should be applied and how non-matrimonial assets such as inheritance should be considered is J v J. ³⁶ However, it is emphasised that the Northern Ireland caselaw is also a valuable source of information on the specific matter of inherited assets.

BUSINESS ASSETS

In McG v McG,³⁷ the issue arose as to how the wife's business should be taken into account during ancillary relief proceedings. The evidence in this case suggested that the husband

^{28 [2002] 33} Fam Law 509, at p. 39.

²⁹ This is so when accounting for the combined value of matrimonial and non-matrimonial assets.

³⁰ A v A (2009) Master 72, at p. 8.

³¹ Wilson, "Inherited wealth", n. 17 above.

³² Norris v Norris [2003] 1 FLR.

³³ H v H (Financial Provision: Special Contribution) [2002] 2 FLR 1021.

^{34 [2004]} EWHC 1364 Fam (2005) 1 FLR 576.

³⁵ Ibid. pp. 33-7.

^{36 [2009]} EWHC 2654 (Fam).

^{37 (2008)} Master 58.

"took much more out of [the business] than he put into it". ³⁸ As a result, value was only ascribed to the business premises (as opposed to the business as a whole). Furthermore, despite a lengthy marriage, the division of the business assets was unequal as Master Redpath stated that the business "would have no value worth talking about" were it not for the petitioner. He also alluded to the fact that the continuation of the business depended upon the current premises. Nevertheless, one can assume that this division hinged upon the specific circumstances of the case. Indeed, it is important to note the Master's assertion that:

in the normal course of events a respondent in a case such as this could expect to receive a significant portion of these premises, if not quite 50 per cent, due to the fact that the premises would be considered part of a business unnecessary for the continuation of that business.⁴⁰

An example of what the Master meant by a more "normal course of events" ⁴¹ is the English case $H \vee H$. ⁴² This case highlights how difficult it is to cleanly slice non-matrimonial assets from a couples' bundle of property, as a large amount of capital was tied up in the husband's business. On the basis of needs and sharing, the wife attained a capital award of 67 per cent of non-business wealth, and the husband was awarded 68 per cent of the total assets. Grandfield has noted that it was justified for the husband to retain his business because he had worked there for 33 years (most of which was prior to his marriage). ⁴³ Furthermore, Moylan J quoted *Miller*, *McFarlane*, and insisted that "in the case of a business, it can be artificial to attempt to draw a sharp dividing line at the parties' wedding day." ⁴⁴ Indeed, as "fairness is a broad horizon" ⁴⁵ the apportionment of business assets in most cases will vary according to whether the parties' needs are greater than their assets.

PREMARITAL PROPERTY

H and W^{46} is an example of when premarital assets can have an impact on the court's distribution of assets during ancillary relief proceedings. In this case, almost all of the properties had been acquired by the husband before he met the respondent. In addition, the husband made virtually the entire financial contribution within the marriage, and so Gillen J saw this as "good reason for departing substantially from equality with regard to non-matrimonial property." However, it is important to remember that the respondent recovered less in this case because the marriage was short.

ASSETS ACQUIRED POST-SEPARATION

The question of how post-marital assets should be divided has also surfaced in recent ancillary relief judgments. Vigus has said that, in practice, the issue of post-separation earnings usually surfaces in "middle class, and middle-aged, divorces". ⁴⁸ This was certainly

^{38 (2008)} Master 58, p. 19.

³⁹ Ibid.

⁴⁰ Ibid. p. 22.

⁴¹ Ibid.

^{42 [2008]} EWHC 935 (Fam).

⁴³ J Grandfield, "Ancillary relief update", 22 August 2008, at http://www.familylawweek.co.uk/site.aspx?i=ed25329.

⁴⁴ H v H [2008] EWHC 935 (Fam), at p. 116.

⁴⁵ Ibid.

^{46 [2006]} NIFam 15.

⁴⁷ Ibid. p. 24.

⁴⁸ K Vigus, "Post-separation accrual and the search for fairness" (2008) Private Client Business 404, at p. 408.

the case in $H ext{ v } H.^{49}$ After marrying in 1974 and separating in 1996, a substantial amount of assets had accrued due to the lengthy separation between the parties and so Master Redpath decided how the court should treat property that is not "strictly speaking" matrimonial. The Master held that it was appropriate in this case to give the wife less than 50 per cent of the assets in order to reflect the post-separation accrual of assets. The departure from equality in this case was not significant because the court felt that "in some respects . . . the respondent under provided for his wife, given his very large income". However, Master Redpath placed particular emphasis on the fact that unequal division was justified because the increase in value of the parties' assets was partly "attributed to the husband's continuing work in the business". With reference to the English authority Rossi v Rossi, 53 H v H reinforces the principle that mere inflationary economic growth is insufficient reason to depart from equality. Rather, post-marital wealth born out of inflation is not a non-matrimonial asset; thus the court will treat it as an increase in value of the parties' original matrimonial property.

Consequently, the fact that economic inflation is not relevant to ancillary relief proceedings also means that, amid the current recession, a deflation in the value of parties' assets will generally be immaterial also. This point was highlighted in $S \times S$, ⁵⁴ where a periodical payments order was not varied even though the impact of the recession on the petitioner's farm had made it difficult for him to afford such payments.

In short, what is clear is that the accretion of assets after the parties have separated will only justify a departure from equality when that increase can be attributed to an extra investment of time and money by one of the parties.

The issue of the division of post-separation assets was again considered by Master Redpath in $A \ v \ A.55$ After the parties' separation, the family business increased in value because the husband had floated it. Therefore, pursuant to *Rossi* v *Rossi* the court took into account:

whether litigation has been unduly delayed and, whether the parties have been financially linked throughout and whether or not the respondent, usually the husband, has failed to make adequate interim provision.⁵⁶

In this case, Master Redpath concluded that there was no financial delay, the parties had remained financially interlinked and the husband had provided for the wife. Therefore, the fact that a substantial amount of the husband's wealth was acquired post-separation was to be taken into account as part of the court's discretionary exercise.

Practitioners may find it useful to corroborate these points with recent English authority. Vigus astutely noted that in these English cases

it is easier to draw the line [between matrimonial and non-matrimonial property for] . . . wealth acquired by one spouse in a business started post-separation . . . than it is in cases where the post-separation accrual is a result of earnings from long-held employment.⁵⁷

^{49 (2007)} Master 52.

⁵⁰ Ibid. p. 10.

⁵¹ Ibid. p. 12.

⁵² Ibid. p. 11.

^{53 [2006]} EWHC 1482 (Fam).

^{54 (2009)} Master 63.

^{55 (2009)} Master 72.

⁵⁶ Ibid. p. 10.

⁵⁷ Vigus, "Post-separation", n. 48 above, at p. 408.

An illustration of the more troublesome latter scenario is H v H.⁵⁸ In this case, Charles J disagreed with the principle from Rossi that a post-separation bonus would become non-matrimonial property after one year of separation. He argued that the court should not define matrimonial and non-matrimonial property too rigidly, as this may "impede a fair settlement".⁵⁹ As a result, H v H did not apply Rossi, and the outcome instead facilitated a gradual adjustment for the wife towards independence by awarding her one-third of the husband's bonus in 2005, one-sixth of the bonus in 2006 and one-twelfth of the bonus in 2007. At face value, it appears that this case conflicts with Rossi because it rejects the one year rule, however, Vigus has emphasised that "the H v H 'run off' bore more than a passing practical resemblance to the Rossi approach of proximity".⁶⁰ Therefore, it appears that the general principles of Rossi, which have been applied in Northern Ireland courts, remain orthodox.

Crucially, the issue of non-matrimonial property within the above jurisprudence has not been viewed in isolation by the courts. It may be considered as part of the parties' contribution to the welfare of the family pursuant to Article 27. Furthermore, the distribution of non-matrimonial assets is significantly influenced by other factors, such as the duration of the parties' marriage and whether or not the needs of the parties can be effectively met. Ultimately, it is apparent that Northern Ireland courts are developing their thinking based on the *White* themes of fairness, sharing and entitlement.

2 Conduct

Article 27 of the Matrimonial Causes Order 1978 provides that the court shall have regard to the conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Master Bell has noted that such conduct "is often divided into three categories: marital, financial and litigation".⁶¹ Recent caselaw has further refined what kind of behaviour may come within the remit of the marital and financial categories of conduct.⁶² The development of each of these categories will be considered in turn.

MARITAL CONDUCT

Since the introduction of no-fault divorce, marital conduct is rarely relevant to the exercise of judicial discretion pursuant to Article 27. As a result, *C and C (Ancillary Relief: Conduct – Rape and Attempted Murder)*⁶³ is a significant case as it denotes the exceptional context of when marital conduct is important within ancillary relief proceedings. In this case, it was held that spousal abuse amounts to marital conduct that it would be inequitable to disregard. The petitioner developed severe chronic depression that her doctor attributed to the violent conduct of the respondent. The petitioner successfully attained a non-molestation order against the respondent, which was breached by him, thus a second non-molestation order together with an occupation order was subsequently obtained. Despite this strong evidence of domestic abuse, it was necessary to consider a number of factors

^{58 [2007]} EWHC 459 (Fam).

⁵⁹ Vigus, "Post-separation accrual", n. 38 above, at p. 408.

⁶⁰ Ibid.

⁶¹ C and C (Ancillary Relief: Conduct - Rape and Attempted Murder) [2009] Master 68, at p. 26.

⁶² Litigation conduct is not considered here because it has not surfaced in recent caselaw. Unlike marital and financial conduct, litigation conduct does not have any impact upon a final ancillary relief order. Rather, it should be penalised in costs.

^{63 [2009]} Master 68, at p. 26.

when deciding the "vexed issue" of parties' conduct within financial ancillary relief proceedings. That is, Lord Nicholls has said that divorce is now based upon "the neutral fact that marriage has broken down irretrievably",65 and so it is deemed undesirable for the judiciary to become involved in "pick[ing] over the events of a marriage [to] decide who was the more to blame for what went wrong, save in the most obvious and gross cases". 66 As a result, in the present case, Master Bell applied S v S⁶⁷ and asked whether the respondent's conduct was so exceptional that it could be described as possessing a "gasp factor".68 Counsel for the respondent submitted that the alleged behaviour did not have a gasp factor, because conduct should occur as specific instances rather than as part of a "course of behaviour".⁶⁹ Nevertheless, Master Bell did not find this argument persuasive and asserted that the nature of abuse in this case, which included rape and attempted murder, "clearly possess[ed]"⁷⁰ the gasp factor. He compared the present case with English authority, which stated that the husband's attempted murder of his wife consequently placed "her needs . . . as a much higher priority". 71 Furthermore, Master Bell agreed with this authority in the sense that the petitioner should receive a greater share because of her mental ill-health, which has been "in a very real way, his fault". 72 As a result, the Master considered that the conduct in this case was such that it was inequitable to disregard it despite the high threshold set by Parliament for consideration of conduct. Consequently, a departure from equality was justified, and the petitioner received 75 per cent of the assets. This included the matrimonial home even though the respondent had made a significant contribution towards the purchase of the property. Therefore, the conclusion one may draw from this case is that domestic violence will not be disregarded simply because it is marital conduct. Rather, the respondent's rape and attempted murder of the petitioner in C and C indicates that this kind of exceptional behaviour may not be simply one of the Article 27 factors to consider; it could be the principal justification of a departure from equality.

It is useful to compare the example in *C* and *C* as to what will constitute conduct that it would be inequitable to disregard against cases demonstrating conduct that is irrelevant to the Article 27 exercise. One such example is *H* and *W*,⁷³ where the petitioner submitted that it would be inequitable to disregard the fact that the respondent had allegedly caused articles about their private lives to be printed in Northern Ireland newspapers. His case was that these articles had a detrimental impact upon his practice and upon his professional and personal reputation. As above, Gillen J considered English authority as to the extent to which conduct can come within a court's consideration in ancillary relief cases.⁷⁴ It has already been emphasised that only extreme conduct will be considered and so Gillen J held that in the present case the alleged conduct was "most certainly not the 'obvious and gross' conduct necessary to invoke the principle [as it] . . . falls far short of that test".⁷⁵ Furthermore, Gillen J stressed that the introduction of such conduct as a factor to be

⁶⁴ Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, at p. 59.

⁶⁵ Ibid.

⁶⁶ Miller v Miller [2006] 1 FLR 151, at p. 145.

⁶⁷ S v S (Non-Matrimonial Property: Conduct) [2007] 1 FLR 1496.

⁶⁸ C and C [2009] Master 68, at p. 36.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ HvH (Financial Relief: Attempted Murder as Conduct) 2005 EWHC 2911 (Fam), at p. 44.

⁷² Ibid.

^{73 [2006]} NIFam 15.

⁷⁴ Miller v Miller [2006] 1 FLR 151.

⁷⁵ H and W [2006] NIFam 15, at p. 14.

considered was an "improper and . . . unnecessary impediment to the cause of resolution", ⁷⁶ thus it is advised that in future parties should be wary of mentioning conduct in ancillary relief proceedings unless it can be described as outrageously unjust.

FINANCIAL CONDUCT

Like marital conduct, the recent jurisprudence regarding financial conduct has also provided guidance as to what kind of conduct is and is not inequitable to disregard. In B and B_s^{77} Master Bell observed that it is "clear that financial improvidence may be taken into account as conduct". 78 Consequently, in this case, his decision was influenced by the respondent's financial conduct during the marriage. The respondent incurred a number of debts without the knowledge of the petitioner, which included a charge registered against the matrimonial home. The charge was executed fraudulently, as the petitioner's signature on the Deed of Charge was a forgery. It was held that this conduct "does not fall into the category of an error of judgment . . . it was instead deceitful and dishonest conduct". 79 As a result, the Master ordered the transfer of the respondent's interest in the matrimonial home to the petitioner. He noted that this outright transfer could only be justified by a "special factor", 80 which in this case was conduct⁸¹ within the context of Article 27. It is submitted that the main reason Master Bell considered the factor of conduct to be "strongly present" as was the fact that the respondent's behaviour "may possibly have led to prosecution for a criminal offence had the petitioner or the bank decided to report the matter to the police". 83 Therefore, it appears that if one party deliberately defrauds their spouse, this will constitute conduct that it would be inequitable to disregard.

N and N⁸⁴ is another recent example where the issue of financial conduct was raised. The petitioner alleged that her husband had received a lump sum of £25,000 in compensation from his employer, but he had not informed her of this. Furthermore, she alleged that her husband had misled her about the amount of his income in order to fund a 20-year relationship with another woman during the marriage. Master Bell emphasised that "the mere fact of an affair will not be relevant in ancillary relief proceedings", ⁸⁵ yet the "financial dimension" of such conduct has implications within the context of Article 27. Thus, the financial conduct in this case was used in part to justify a departure from equality, awarding 65 per cent to the petitioner. Interestingly, the respondent's conduct was accorded sufficient weight even though the petitioner's allegations were based on hearsay evidence.

The financial behaviour of the respondent in *C* and *C* (Ancillary Relief: Conduct – Rape and Attempted Murder) should also be considered in this section. The petitioner's evidence was that her husband "generally spent his money selfishly, squandering it on both drinking and gambling".⁸⁷ This behaviour affected the family detrimentally and therefore Master

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76 H and W [2006] NIFam 15.
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^{77 (2008)} Master 54.

⁷⁸ Ibid. p. 27.

⁷⁹ Ibid. p. 28.

⁸⁰ Ibid. p. 41.

⁸¹ It should be noted that pursuant to Duckworth, *Matrimonial Property*, n. 27 above, s. B4, paras 32–8, three other possible special factors that will justify an outright transfer of the matrimonial home are; if the husband has been a poor provider, a general ground of need and a risk of bankruptcy.

⁸² B and B (2008) Master 54, at p. 35.

⁸³ Ibid. p. 28.

^{84 [2009]} Master 64.

⁸⁵ Ibid. p. 16.

⁸⁶ Ibid.

⁸⁷ C and C [2009] Master 68, at p. 19.

Bell took it into account when assessing the parties' contributions to the welfare of the family. Accordingly, the husband's financial behaviour was not taken into account as conduct. Nevertheless, one can assume that if this type of conduct was not considered as a factor of contribution, it could be considered as financial conduct that it would be inequitable to disregard.

Indeed, the importance of accounting for certain kinds of financial misconduct within ancillary relief proceedings was highlighted by the English authority *Martin* v *Martin*:⁸⁸

Such conduct must be taken into account because a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably.⁸⁹

Nevertheless, Freeman and Freeman⁹⁰ demonstrates that not all variants of financial improvidence will be taken into account in ancillary relief proceedings. In this case, Master Bell concluded that the respondent's disposal of his voluntary redundancy money could be taken into account as conduct because the petitioner received none of it. However, the fact that the matrimonial home had been repossessed due to the respondent's debts was considered inappropriate to be taken into account. As a result, it appears that the definition of financial misconduct is limited, as poor money management will not be considered as part of the Article 27 exercise. Similarly, the type of expenditure in $A v A^{91}$ was not "regarded as wanton or reckless" enough. In this case, Master Redpath followed McCartney $v Mills McCartney, ^{93}$ which said that "clear evidence of dissipation" is required.

One should note that the above caselaw has helped to develop what constitutes conduct that it would be inequitable to disregard based on *Miller* v *Miller* and *McFarlane* v *McFarlane*. This recent jurisprudence has consistently emphasised the principle in *Miller*, *McFarlane* that conduct should only be taken into account in very limited circumstances. Interestingly, developments in Northern Ireland correspond with Hood's reports that, in England, conduct "cases with a financial flavour have become more common recently". Therefore, although it is difficult to "reach the extremities of behaviour [especially] in financial dealings that a finding of conduct requires" the above cases importantly highlight the kind of behaviour that is of sufficient significance to be considered in ancillary relief proceedings.

3 Clean break

This section will discuss the jurisprudence surrounding the circumstances in which a clean break order should and should not be made, and what the caselaw says about reopening clean breaks.

WHEN A CLEAN BREAK IS APPROPRIATE

Pursuant to Article 27A, the court must consider whether a clean break is appropriate so that the financial obligations of each party can be terminated as soon after the grant of the

^{88 [1976]} Fam. 335.

⁸⁹ Ibid. p. 342.

^{90 (2007)} Master 49.

^{91 (2009)} Master 72.

^{91 (2009)} Waster 72

⁹² Ibid. p. 335.

^{93 [2008]} EWHC 401 (Fam).

⁹⁴ Ibid. p. 160.

⁹⁵ H Hood, "The role of conduct in divorce suits and claims for ancillary relief" (2009) 39 Family Law 948-53.

⁹⁶ Ibid.

decree nisi as is just and reasonable. The court's decision as to whether or not a clean break is appropriate will evidently depend on the individual circumstances of the case.

Indeed, as Duckworth has aptly noted, "plainly a clean break would be more 'appropriate' in some cases than in others". For example, a clean break was recently considered to be just in *Stevenson*, as the parties had not lived together for a number of years and had both moved on. Indeed, Waite J is frequently cited as stating the importance of enabling divorcing couples "to go their separate ways without the running irritant of financial interdependence or dispute". Nevertheless, as this is not always possible it is worthwhile considering recent decisions where a clean break has been deemed inappropriate. *C and C*¹⁰⁰ is an interesting judgment because a periodical payments order was made even though the parties had a substantial pool of matrimonial assets. The petitioner gave up her job when the couple's first child was born, but when the marriage ended, she sought to obtain further qualifications to improve her career prospects. As the petitioner was re-entering the workforce in her late forties after being married to "a well paid executive", the court felt that a periodical payments order instead of a clean break would allow the petitioner to "adjust without undue hardship". As a result, it appears that a clean break is less likely when there is significant disparity of income between the parties. 103

Indeed, it is often impossible for the court to facilitate a clean break for the majority of families with modest incomes. Despite this, Baroness Deech has recently opined that judges have "largely ignored the statutory direction to achieve a 'clean break' wherever possible". ¹⁰⁴ However, it is submitted that the judiciary has not simply dismissed this factor. Rather, the court cannot allow a clean break unless the parties have adequate resources to live completely independently of one another. Thus, it could be argued that Baroness Deech has overlooked the fact that the court will rarely encounter a couple who have the same economic comfort living separately as they had when they lived together.

WHEN A CLEAN BREAK MAY BE REOPENED

The issue of when clean break orders may be reopened has become quite topical in recent months due to the economic downturn. This is because a suitable clean break settlement agreed last year may now be unsuitable when land and property have depreciated in value. The caselaw¹⁰⁵ concedes that a clean break order may be reopened if there has been a mistake in the valuation of the property at the time the order was made. Alternatively, an

⁹⁷ Duckworth, Matrimonial Property, n. 27 above.

^{98 [2008]} NIFam 8.

⁹⁹ Tandy v Tandy (unreported) 24 October 1986 per Waite J.

^{100 (2007)} Master 44.

¹⁰¹ Ibid. p. 10.

¹⁰² Ibid. p. 9.

¹⁰³ The facts of this case are resonant with *Miller*, *McFarlane*, where at p. 39 Lord Nicholls emphasised that the clean break principle could not be used to prevent one party from receiving compensation that would ameliorate significant economic disparity between both parties after separation.

^{104 &}quot;Divorcing women should not get half husband's wealth", *The Telegraph*, 14 September 2009, at www.telegraph.co.uk/news/6188765/Divorcing-women-should-not-get-half-husbands-wealth-says-leading-law-expert.html (last accessed 18 October 2009).

¹⁰⁵ Cornick v Cornick [1994] 2 FLR 530.

order can be reopened if it satisfies the *Barder* principle¹⁰⁶ and something unforeseen and unforeseeable has happened since the order was made. However, fluctuation in price as a result of the recession does not fit within these options. In *MG McG and B McG*,¹⁰⁷ the issue was whether an agreement facilitating a clean break between the parties could be altered when it hinged upon a business and former matrimonial home that had significantly decreased in value since the agreement was made. In his judgment, Morgan J (as he then was) considered a series of English cases including *Cornick* v *Cornick*,¹⁰⁸ which concluded (on the basis of similar facts to *McG*) that the cause of a difference in valuation of assets coincided with the following situation:

An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.¹⁰⁹

4 Equality

In *Miller, McFarlane*, Baroness Hale famously stated that, in ancillary relief proceedings, "the ultimate objective is to give each party an equal start on the road to independent living". However, *G and G and J* ¹¹⁴ has underlined the crucial point that one should not assume that an "equal start" automatically means a 50/50 split of the parties' assets. In this case, Gillen J stated that "the courts must be wary of relying too heavily on formal equality as a means of ensuring real fairness at the expense of applying the tests in [the Matrimonial Causes

¹⁰⁶ According to Barder v Calouri (1988) AC 20, three conditions must be met before the Barder principle can be satisfied. These are as follows; "1. New events have occurred since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. 2. The new events should have occurred within a relatively short time of the order being made. While the length of time cannot be laid down precisely . . . it [is] extremely unlikely that it could be as much as a year, and . . . in most cases it will be no more than a few months. 3. The application for leave to appeal is made reasonably promptly."

^{107 [2009]} NIFam 6.

^{108 [1994] 2} FLR 530.

¹⁰⁹ MG McG and B McG [2009] NIFam 6, at p. 12.

¹¹⁰ S v S (Non-Matrimonial Property: Conduct) [2007] 1 FLR 1496.

¹¹¹ MG McG and B McG [2009] NIFam 6, at p. 13.

¹¹² Ibid. at p. 15

¹¹³ Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, at p. 144.

^{114 [2003]} NIFam 19.

Order]". ¹¹⁵ For example, in *G* and *G* and *J*, he noted that, "on a basis of pure equality", ¹¹⁶ the wife would receive over 89 per cent of the liquid assets, leaving the husband with only 10.3 per cent of the liquid assets. This illustrates that equitable division pursuant to Article 27 is not always the same as a mathematical equal split upon divorce. As the court must have regard for the financial responsibilities, financial resources and financial needs that each of the parties may have in the foreseeable future, it appears that in reality the yardstick of equality must be moulded to fit what is equitable for the individual. This could mean that strict equality is departed from, as in *G* and *G* and *J*, where the husband and wife received 54.35 per cent and 45.64 per cent of the assets respectively. ¹¹⁷

5 Specific developments

A number of recent judgments have clarified important yet specific points of law, which will be considered in turn.

DEFINITION OF "CHILD OF THE FAMILY"

One of the principal issues in H and W^{118} was whether or not the petitioner's child (K) from her first marriage should be regarded as a child of the family. The respondent's case was that he had never treated the child as his daughter and that the petitioner's arguments to the contrary were a device to attain more money from the divorce. This difficult debate was confronted by Gillen J, who avoided the minutiae of the parties' evidence and instead adopted a broad approach (applying $M \vee M)^{119}$ He concluded that the child was treated as a daughter by both parties, on the basis of the wife's description of the respondent's behaviour towards the child and the fact that the child had lived in the same household as the parties during their entire five-year relationship. Therefore, satisfied that K was indeed a child of the family, the court ordered for provision to be made for her by way of capital in the clean break settlement. One can assume that in subsequent cases the court will look to the nature of the relationship between the child and the parties when deciding whether he or she is a child of the family. In H and W, relevant evidence of a close family relationship included the fact that the respondent introduced K as his stepdaughter on a number of occasions and behaved as her parent in dealings with the child's school. 120

DISABILITY OF A CHILD OF THE FAMILY

F and F¹²¹ is concerned with how a disabled child may affect the outcome of ancillary relief proceedings. Article 27 requires the court to give first consideration to the welfare of any child under 18. Thus, the court in this case was obliged not only to account for the general welfare of the child, but also to consider the fact that the petitioner will have an ongoing commitment due to her child's disability. As this commitment invariably invokes financial responsibility, Master Redpath stated that the courts could require the respondent to pay

^{115 [2003]} NIFam 19, p. 49.

¹¹⁶ Ibid. p. 51.

¹¹⁷ The principle of equality within ancillary relief proceedings has been of paramount importance since the decision of White v White. However, a comprehensive and academic examination of the development of this principle is outside the remit of this article, which simply aims to outline the main developments apparent in the caselaw of ancillary relief in Northern Ireland.

^{118 [2006]} NIFam 15.

^{119 [1980] 2} FLR 39.

¹²⁰ Some examples of such dealings would be giving permission on the child's behalf, providing signatures for the child or attending parent's evenings.

^{121 (2007)} Master 56.

maintenance beyond the time the child is in full-time education.¹²² Furthermore, the court ordered that the special circumstances of the child's disability justified an award of 65 per cent in favour of the petitioner. The effect of this decision meant that the petitioner received almost twice the capital assets awarded to the respondent.

In addition, it appears that the age of a child is less important when he or she is disabled. Although priority will usually not be given to a child over the age of 18, in B and B^{123} an award was made in favour of the primary carer of a 21-year-old with severe learning difficulties. The fact that the child could neither live independently nor be left on her own at any time was "unquestionably relevant" 124 to the outcome of the case. Hence, when a child of the family has a disability, which imposes a significant responsibility on the primary carer, a considerable departure from equality may be necessary.

CONFLICTING EVIDENCE

One of the focal issues in *Eladhame and Eladhame*¹²⁵ was what the appropriate approach should be when there is a conflict of evidence between the parties. In this case, there were various discrepancies, for instance the way in which the couple's finances were used to support the respondent's family in Egypt. In his judgment, Master Bell pinpointed the difficulties with reconciling conflicting evidence by citing Lord Bingham:

How is [the judge] to resolve which witness is honest and which dishonest, which reliable and which unreliable? 126

However, the Master concluded that the truth could be uncovered by examining the consistency of the parties' evidence, and the credibility and demeanour of each party. After cross-examination it was revealed that the respondent had been untruthful with regard to one of the financial issues, and so on the balance of probabilities Master Bell concluded that the petitioner had been telling the truth with regards to the parties' financial contributions towards the outgoings. The Master also mentioned that there may have been additional confusion in the mind of the respondent as English was not his first language. Accordingly, it appears that when parties in ancillary relief proceedings present conflicting evidence, the court will take the circumstances as a whole into account, including the credibility and consistency of each party. On the other hand, when reconciling inconsistent evidence, it is important to emphasise Master Bell's point that:

Article 27(2)(f) does not . . . provide a mechanism whereby any conflict on financial matters which was unresolved during the marriage may subsequently be resurrected as a new battleground.¹²⁷

GIFTS

Master Redpath has recently opined that:

It is distasteful in the extreme to have to enter into a debate about how much of a gift, freely given, should be taken into account in [ancillary relief] proceeding \dots 128

¹²² This kind of order was imposed by the court in C v F (Disabled Child: Maintenance Orders) [1998] 2 FLR 1.

^{123 (2008)} Master 66.

¹²⁴ Ibid. p. 19.

^{125 (2008)} Master 56.

¹²⁶ Ibid. p. 33.

¹²⁷ Ibid. p. 35.

¹²⁸ McG v McG (2008) Master 58, at p. 26.

Nevertheless, this kind of debate is unfortunately common when couples divorce. In MeG v MeG, 129 there was contention as to whether or not allegedly valuable jewellery given by the respondent to the petitioner should be taken into account by the court. After accepting that the jewellery was worth £19,000 (based on a valuation produced by the petitioner), Master Redpath concluded that within the circumstances of this case the jewellery should not be considered. This indicates that the court will not look favourably upon parties seeking to wrangle over gifts in ancillary relief proceedings unless such gifts are worth a substantial sum of money. Indeed, it appears that in most cases gifts made during the marriage are irrelevant to the court.

KHANNA SUMMONSES

In certain cases, a "Khanna" summons may be very useful to practitioners, particularly in ancillary relief proceedings. 130 However, an almost complete absence of caselaw on the matter makes it difficult for those whose practice does not include their frequent use to become familiar with their complexities. Therefore, it is submitted that M v M (No 2 of 2007)¹³¹ is one of the best examples of how a Khanna summons operates in the context of ancillary relief. Briefly, a Khanna summons is used to subpoena a third party to give evidence at trial. In the present case, a Khanna summons was served on a solicitor who had acted in a property transaction that conveyed the title of a villa in Portugal from the respondent's parents to the petitioner and respondent as joint tenants. On divorce, the respondent alleged that this transaction was never completed. Therefore, the principal issue was whether the solicitor's documents pertaining to the transaction in question could be produced despite objections on the basis of legal professional privilege. It was held that the file should be produced for a number of reasons. Firstly, the case of Khanna v Lovell White Durant 132 sets a precedent that documents may be received from a non-party. Secondly, the application of Regina v Inner Court London Crown Court, ex parte Baines & Baines (a firm) and Anor 133 clearly indicates that a conveyancing file is not within the scope of legal professional privilege as defined in the *Three Rivers Case*. ¹³⁴ Thirdly, it is possible for specific elements in a file, which attract legal professional privilege, to remain undisclosed. Finally, the documents were not being produced to any third party; the person seeking disclosure of the file was a party to the original conveyance. Thus, a Khanna summons was successfully used to compel disclosure of the details of the contested transaction. As a result, this case shows how a Khanna summons can be an effective remedy when one party has endeavoured to conceal assets from the other party; a problem that is unfortunately becoming prevalent in ancillary relief proceedings.

Conclusion

One may find it frustrating to finish reading this article without a definitive answer to many of the above issues. That is, there is no formula to calculate the specific apportionment of non-matrimonial property, and the equal sharing principle does not guarantee each party 50 per cent. This is simply because the division of property on divorce hinges upon what is

^{129 (2008)} Master 58.

¹³⁰ Derived from Khanna v Lovell White Durant [1994] 4 All ER. This type of summons is now covered in England and Wales by the Rules of the Supreme Court. However, in Northern Ireland this common law mechanism (Khanna summons) is prevalent in the absence of similar legislation.

^{131 (2007)} Master 50.

^{132 [1994]} All ER 269.

^{133 [1988]} QB 579.

¹³⁴ Three Rivers District Council & Ors v Governor & Company of the Bank of England [2004] UKHL 489.

fair within the context of each case. As a result, when wondering how proceedings will be affected by inheritance, conduct or contribution, the short answer can only be: it depends.

Nevertheless, even though the nature of ancillary relief means that the outcome of each case will largely depend upon the circumstances of the individual, the principles from recent jurisprudence are still crucially relevant. The above developments appear to be following a similar tack to England and Wales, and give a clear indication of how various issues are being resolved in the courtroom post-White v White and Miller, McFarlane. One can be confident that non-matrimonial assets will be treated as one of the circumstances of the case and will not be ignored. It is also more apparent what kind of conduct is relevant to proceedings. Furthermore, it is submitted that each case in this paper has uncovered the fact that Northern Ireland courts are applying a yardstick of equality that is flexible enough to facilitate equitable (but not always equal) division according to the facts of the case. In conclusion, it appears that "need is the most important player of the three principles" 135 from Miller, McFarlane, because for the majority of divorcing couples, the main worry is not how their fortunes will be divided, but whether their assets will merely stretch to satisfy their needs. Indeed, amid the present economic climate, millionaire divorces are not representative of ancillary relief proceedings. The above jurisprudence exacerbates this reality, as in many cases the court has divided property in a way that will cause least hardship for the parties involved. As a result, recent ancillary relief judgments in Northern Ireland provide an excellent indication of how the "big money" 136 cases have filtered down into everyday divorce where parties' need is not subsumed by riches.